

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARIA N. GRACIA,

Plaintiff,

VS.

SIGMATRON INTERNATIONAL, INC.,

Defendant.

No. 11 CV 07604

Chicago, Illinois
December 9, 2014
1:30 o'clock p.m.

**TRANSCRIPT OF PROCEEDINGS - PRETRIAL CONFERENCE
BEFORE THE HONORABLE EDMOND E. CHANG**

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01:13:04 1 THE CLERK: 11 C 7604, Gracia versus SigmaTron.

01:38:32 2 THE COURT: All right.

01:38:32 3 Let's get appearances.

01:38:34 4 MR. ADAMS: Hall Adams for the plaintiff.

01:38:35 5 MS. KORN: Kathryn Korn for the plaintiff.

01:38:38 6 MS. CARPENTER: Tiffany Carpenter for SigmaTron.

01:38:41 7 MR. RIORDAN: Tim Riordan for SigmaTron.

01:38:44 8 THE COURT: Good afternoon.

01:38:45 9 Okay. Let's try to move through briskly so you can
01:38:49 10 move through your trial preparation.

01:38:52 11 So the first thing I wanted to talk about was the
01:38:56 12 pre-opening statement set of instructions, and I posted that
01:39:04 13 this morning, I think it was. The hours are running together.
01:39:09 14 It may have been late last night, but I think early this
01:39:12 15 morning.

01:39:13 16 So what, if any, comments do you have on that?

01:39:22 17 MR. ADAMS: Judge, we have no objections to that set
01:39:26 18 of instructions.

01:39:27 19 MR. RIORDAN: Your Honor, we have a couple of
01:39:29 20 comments to make.

01:39:30 21 THE COURT: All right.

01:39:31 22 MR. RIORDAN: On Page 2, with respect to the case
01:39:36 23 statement, second paragraph on Page 2, there is no reference
01:39:41 24 to the fact that the sexual harassment had to be severe, as
01:39:47 25 the instruction requires, and I think that should be added.

01:39:52 1 THE COURT: That is definitional, which is a job for
01:39:58 2 the instructions rather than the case statement. So it is a
01:40:02 3 hostile work environment claim, so we are not going to put
01:40:06 4 that definitional aspect in.

01:40:08 5 Okay. Next?

01:40:12 6 MR. RIORDAN: That was it, Your Honor.

01:40:13 7 THE COURT: Okay.

01:40:23 8 I do want to point out, because the plaintiff had --
01:40:30 9 or the defendant had proposed this, in the definition of
01:40:35 10 hostile abusive work environment there is -- if you turn to
01:40:38 11 Page 8 on the bottom, Page 9 of the PDF, this paragraph, the
01:40:54 12 second paragraph, came from a pattern that is tucked into a
01:41:03 13 committee comment, and I think it is fair to give. It was
01:41:09 14 proposed by the defendant, but I wanted to point out that I
01:41:17 15 removed the last sentence.

01:41:19 16 And hold on. Let me find this.

01:41:23 17 MR. RIORDAN: We did note that, Your Honor, and we
01:41:25 18 don't have any objection to it.

01:41:27 19 THE COURT: Okay. I just wanted to make sure that
01:41:30 20 you didn't miss it.

01:41:31 21 And just for the record, it would be even more
01:41:33 22 confusing to define material terms and conditions of
01:41:37 23 employment.

01:41:38 24 But I wanted to flag it because I didn't give you a
01:41:42 25 red line.

01:41:43 1 MR. RIORDAN: One other comment we do have.

01:41:45 2 You did include that limiting instruction that we had

01:41:48 3 proposed once the Court had denied our motions regarding

01:41:53 4 exclusion of all references to national origin.

01:41:57 5 THE COURT: Right.

01:41:58 6 MR. RIORDAN: And I just want to make it clear that

01:42:00 7 we are -- we propose that instruction without waiving the

01:42:04 8 argument that national origin should not be mentioned in any

01:42:08 9 way.

01:42:09 10 THE COURT: Right. Right.

01:42:10 11 That was the Plan B. And so it certainly is

01:42:12 12 preserved.

01:42:14 13 MR. RIORDAN: Okay.

01:42:15 14 THE COURT: I do want to note that I changed the

01:42:17 15 language of the limiting instructions some to fit with the

01:42:22 16 fact that the jury would have heard the case statement, you

01:42:27 17 know, pretty soon before this, and I just thought it was a

01:42:31 18 little less legalese. So that is why it appears in that

01:42:36 19 format.

01:42:42 20 MS. CARPENTER: Judge, do you intend to give that

01:42:44 21 instruction the first time that evidence is promulgated with

01:42:48 22 that information?

01:42:48 23 THE COURT: No, it will be at this time and at the

01:42:53 24 end, as I had previously said.

01:42:55 25 Now, with regard to the trial and jury instructions,

01:42:59 1 I just have a couple comments, and then I will try to pose
01:43:02 2 something soon. Not comments. They are questions.

01:43:18 3 Plaintiff's Number 4. Plaintiff's proposed
01:43:20 4 instruction Number 4. I will remind you that it was a
01:43:24 5 definition of proximate cause, and it is from the Illinois
01:43:29 6 Pattern Instruction.

01:43:31 7 Now, I don't -- and, of course, the defense has
01:43:35 8 objected to this, and I don't see a need for proximate cause
01:43:40 9 definition for damages, all right, because there is a pattern
01:43:45 10 instruction in the Seventh Circuit for compensatory damages
01:43:48 11 for employment discrimination cases, and it doesn't inject
01:43:52 12 this idea of proximate cause, and I think that is right to not
01:43:57 13 inject that issue.

01:44:00 14 Were you proposing this Illinois Pattern Instruction
01:44:05 15 for something to do with liability?

01:44:17 16 MR. ADAMS: Judge, with respect to the retaliation
01:44:23 17 claim; that is, the protected conduct was a cause, a proximate
01:44:42 18 cause, of the termination, and we were concerned that the
01:44:48 19 pattern instruction wasn't clear on the causation element of
01:44:57 20 the retaliation claim.

01:45:01 21 THE COURT: All right.

01:45:02 22 My take on that is this: Your very next instruction
01:45:08 23 is a proposal on mixed motive, all right, and although this
01:45:19 24 instruction, the way you phrase it, is connecting it to
01:45:25 25 harassment, under the statute, and the defense can speak to

01:45:30 1 this, although I didn't see an objection based on this, the
01:45:33 2 statute, it is 2000 E-2, Subparagraph M, says that if there is
01:45:41 3 a mixed motive for an unlawful employment practice then there
01:45:44 4 is still liability, but it defines or refers to unlawful
01:45:53 5 employment practice, which includes both harassment and
01:45:56 6 retaliation, retaliation is 2000 E-3.

01:46:03 7 So it seems like the mixed motive instruction, and I
01:46:08 8 thought there was a pattern on this, too, is applicable to
01:46:16 9 both claims.

01:46:20 10 So if the plaintiff had the mixed motive instruction,
01:46:24 11 shouldn't that take care of, I think, what you are trying to
01:46:28 12 propose?

01:46:31 13 MR. ADAMS: Judge, I don't disagree with that.

01:46:36 14 THE COURT: Okay.

01:46:37 15 What is the defense position? There might not be a
01:46:41 16 mixed motive pattern.

01:46:44 17 MR. RIORDAN: I was going to say, Your Honor, that if
01:46:47 18 it was intended to tell the jury if there were two motives, if
01:46:53 19 at least one is discriminatory, that is not the standard. In
01:46:57 20 a case like this it is a "but for" standard.

01:47:06 21 THE COURT: I don't think that that is -- your
01:47:09 22 objection was not based on that, the written objection. You
01:47:16 23 can research this if you like, and certainly it may be that
01:47:22 24 the proposal that the plaintiff has laid out should be further
01:47:27 25 explained, but 42 USC 2000 E-2, Subparagraph M, says, Except

01:47:41 1 as otherwise provided in this subchapter, an unlawful
01:47:46 2 employment practice is established when the complaining party
01:47:50 3 demonstrates that, and then it has all the protected
01:47:54 4 categories, was a motivating factor for any employment
01:47:57 5 practice, even though other factors also motivated the
01:48:01 6 practice.

01:48:02 7 And then the definition of unlawful employment
01:48:07 8 practice, it certainly includes harassment, and it also
01:48:10 9 includes retaliation, but maybe the cases saying mixed motive
01:48:17 10 does not refer to retaliation, but that is certainly not the
01:48:21 11 parenthetical's description of what you have in the written
01:48:25 12 objection.

01:48:26 13 So here is what we will do, rather than try to hash
01:48:29 14 this out: You can go ahead and try to research that question.
01:48:34 15 It certainly applies to the hostile work environment,
01:48:38 16 harassment, and it is, I suppose, an open question as to
01:48:42 17 whether it applies to retaliation.

01:48:44 18 So you should both look at that and research the
01:48:49 19 issue, and then we can -- you know, we will have to figure out
01:48:58 20 either at the start of the trial or during trial how this
01:49:01 21 instruction is going to look, but, again, it is definitively
01:49:09 22 mixed motive is -- this does -- that does apply to the
01:49:12 23 harassment, and I think the only open question then is
01:49:14 24 retaliation.

01:49:28 25 Then the next question I have is on Plaintiff's

01:49:31 1 Instruction Number 6.

01:49:35 2 MS. CARPENTER: Judge, sorry.

01:49:36 3 Before we move to Number 6, you alluded to this at
01:49:40 4 the beginning, but Plaintiff's Number 5 appears to be related
01:49:43 5 to the sexual harassment claim, not the retaliation claim.

01:49:49 6 THE COURT: But what I am saying is if you look at
01:49:51 7 the statute it says, unlawful employment practice, if they
01:49:55 8 were trying to get across the idea with their proximate cause
01:49:59 9 instruction, which I don't think adequately gets across the
01:50:02 10 idea, but if there was more than one cause, then the question
01:50:08 11 that I had put to both sides at this point is whether or not
01:50:13 12 the mixed motive principle that is expressed in this
01:50:21 13 Subparagraph M also applies to retaliation.

01:50:24 14 Now, Plaintiff's Instruction Number 6.

01:50:33 15 So, I guess, try to explain the thinking here on the
01:50:42 16 retaliation.

01:50:43 17 What were you saying with this one?

01:50:46 18 MS. KORN: We are saying that one possibility is that
01:50:50 19 Mr. Silverman was not the decision maker, was the person with
01:50:59 20 the largest retaliatory motive. He was a conduit to
01:51:05 21 Mr. Fairhead, who was the decision maker.

01:51:07 22 THE COURT: So this is the cat's paw --

01:51:11 23 MS. KORN: Cat's paw, yes.

01:51:13 24 MR. RIORDAN: Your Honor, at a minimum I think you
01:51:16 25 would have to withhold determination on this one. I don't

01:51:19 1 think there is going to be any evidence whatsoever regarding
01:51:22 2 Mr. Silverman suggesting to Mr. Fairhead that she be
01:51:27 3 terminated, and the factual basis for cat's paw would not
01:51:34 4 apply.

01:51:35 5 THE COURT: I will reserve its applicability.

01:51:39 6 What you should both do, really the defense should
01:51:42 7 do, is if you don't like the wording of this, in case I decide
01:51:45 8 that factually it applies, is to have some kind of backup, and
01:51:50 9 I will look into this, too, because it certainly doesn't
01:51:52 10 reflect the language in the Supreme Court's decision on cat's
01:51:57 11 paw, which does use the proximate cause terminology.

01:52:04 12 But something like conduit, I don't know if that is
01:52:07 13 going to be the right wording. So yes, I will reserve, based
01:52:12 14 on what evidence is presented, but start looking at it now so
01:52:16 15 that you have the language ready, and I will do the same.

01:52:40 16 That is it for the questions that I had.

01:52:54 17 There was also the summary chart updated, and there
01:53:03 18 was a question, I think, that the defense posed, which was
01:53:12 19 whether -- what formally was in Category 5 could be included
01:53:19 20 in the volume category for Category 6, right?

01:53:23 21 MS. CARPENTER: Yes, Judge.

01:53:25 22 THE COURT: And just to confirm, again, all these
01:53:29 23 e-mails are from Silverman?

01:53:31 24 MS. CARPENTER: Yes, Judge.

01:53:32 25 And, sorry, if I could just add, we had gone through

01:53:36 1 all the categories, so Category 2(a), 2(b), and withdrawn
01:53:43 2 basically all of category 2(b) and all of category 2(a) but
01:53:49 3 for one of them. So that is what we included in our disk.

01:53:54 4 And what we were going to ask Your Honor is if we
01:53:57 5 could just include them in the summary chart in 6.

01:54:10 6 THE COURT: Okay.

01:54:10 7 So basically they show up as numbers, not just a line
01:54:20 8 entry?

01:54:21 9 MR. RIORDAN: The volume of them.

01:54:23 10 THE COURT: Do you have any objection to that?

01:54:25 11 MS. KORN: We continue to have an objection about the
01:54:29 12 volume number being unreliable.

01:54:31 13 THE COURT: Right.

01:54:32 14 MS. KORN: And I note at the last -- I re-read what
01:54:35 15 we discussed at the last session of the pretrial conference,
01:54:38 16 and I failed to mention that one of our unreliability -- two
01:54:42 17 of our unreliability prongs are that SigmaTron has no document
01:54:46 18 retention policy, and they affirmatively have an electronic
01:54:50 19 communications policy which tells employees, don't save your
01:54:54 20 e-mails.

01:54:55 21 So, again --

01:54:58 22 THE COURT: But this volume question, though, that
01:55:01 23 could only have hurt the defendant, right, because if they
01:55:07 24 have more -- just on this volume issue, like what they are
01:55:10 25 trying to show is that Silverman sent many, many e-mails to

01:55:15 1 the plaintiff and that, you know, the harassing ones were a
01:55:24 2 smaller subset.

01:55:26 3 So that issue about not finding more e-mails is not,
01:55:30 4 I don't think, a response to the volume argument.

01:55:34 5 So you can go ahead and push 2(a), and I think
01:55:40 6 Category 4, as well, has already been pushed in, or did you
01:55:44 7 completely take out --

01:55:45 8 MS. CARPENTER: We left Category 4 in because
01:55:48 9 Your Honor, I think, said depending on what happens during
01:55:51 10 trial, it could or could not come in. And so we included it
01:55:55 11 in there. But I am happy to put it wherever you want me to
01:55:59 12 put it.

01:56:00 13 THE COURT: Did you already move it into Category 6?

01:56:03 14 MS. CARPENTER: No.

01:56:10 15 THE COURT: All right.

01:56:11 16 So since Category 6 is a volume issue, I have no
01:56:16 17 problem with moving -- there are many, but the Category 4
01:56:19 18 e-mails into the volume one, as well; and if she opens the
01:56:25 19 door somehow to this general rule enforcement issue, then it
01:56:29 20 will be its own category as well.

01:56:34 21 MS. CARPENTER: Thank you.

01:56:35 22 THE COURT: So you can push everything into the
01:56:37 23 volume category.

01:56:46 24 So those are the only questions I had.

01:56:55 25 What else do you want to raise for the plaintiff?

01:56:57 1 MR. ADAMS: Judge, can you give us an amount of time
01:57:00 2 that you expect jury selection to take with respect to our
01:57:04 3 then lining up witnesses for Monday?

01:57:06 4 THE COURT: My goal is to finish jury selection
01:57:09 5 either right before lunch or right after it. So you should
01:57:17 6 prepare to open at like 1:00 o'clock.

01:57:23 7 MR. ADAMS: And for purposes of examining witnesses,
01:57:26 8 I know that your standing order says to do it all from the
01:57:30 9 lectern at the microphone. Can we monkey with the position
01:57:35 10 of the lectern so that we can see the witness and see the
01:57:39 11 jury?

01:57:40 12 THE COURT: Yes. You can carefully move it into a
01:57:42 13 position where it is facing the witness.

01:57:45 14 MR. ADAMS: And is that also a procedure you ask us
01:57:51 15 to follow for opening statement and closing argument?

01:57:55 16 THE COURT: Yes. I will tell you the reason.

01:57:58 17 When I was a trial lawyer, I loved the freedom of
01:58:01 18 moving around the courtroom. The problem is with our
01:58:04 19 technology, the microphones are what is recording your voice,
01:58:09 20 so even if I can hear you, if you are not near a microphone it
01:58:13 21 is actually not being recorded. So if there is ever an issue
01:58:16 22 with the transcript and you have to go back to the recording,
01:58:19 23 we won't have it.

01:58:20 24 So you have got to be at the lectern.

01:58:25 25 MR. RIORDAN: But in openings you could turn it

01:58:27 1 toward the jury?

01:58:29 2 THE COURT: Yes. That is what I expect you to do for
01:58:32 3 openings.

01:58:39 4 We do have some lavalieres and things like that, but
01:58:42 5 they have never worked well.

01:58:44 6 Other questions from the defense now?

01:58:46 7 MS. CARPENTER: Yes, Judge.

01:58:48 8 Regarding the exhibits, it was our understanding that
01:58:51 9 the disk that was going to Ms. Brooks was the disk that then
01:58:55 10 would be given to the jury, and so we took a look at
01:58:59 11 plaintiff's disk that she provided to Ms. Brooks, and it
01:59:03 12 included six of the exhibits that you had already ruled as
01:59:08 13 inadmissible.

01:59:09 14 So we then asked plaintiff to provide a new disk
01:59:13 15 without those, specifically Exhibit 1, which is the Homeland
01:59:18 16 Security; Exhibit 7, the one pasted on; Exhibit 8, the
01:59:29 17 Mariachi; Exhibit 9 is the map, and those have to do with her
01:59:34 18 national origin claim.

01:59:35 19 And then there were two exhibits, 13, which is the
01:59:38 20 annual report, and Exhibit 18, which is Mr. Fairhead's
01:59:41 21 affidavit, and those had to do with claims that you
01:59:44 22 determined, for various reasons, those exhibits all couldn't
01:59:49 23 come in.

01:59:52 24 THE COURT: Thank you for flagging it.

01:59:55 25 The system requires us to affirmatively click the

02:00:00 1 ones that will go back to the -- be displayable to the jury,
02:00:05 2 and so it is okay if there are too many on there. I will just
02:00:10 3 -- we will be -- we have to release exhibits to the jury, so
02:00:18 4 we just won't release those. Okay?

02:00:21 5 If for some reason the door gets open on something,
02:00:25 6 then it is actually a little easier to have it there, but do
02:00:30 7 not be concerned that the jury is actually going to get that
02:00:34 8 disk. What they get is -- they will get a list of the
02:00:41 9 exhibits released to them, and we will only release those
02:00:45 10 admitted into evidence.

02:00:46 11 And so, indeed, almost always the -- what we get from
02:00:50 12 the parties, even if we have gone through in great detail what
02:00:54 13 should come in and what can't come in, is almost always a
02:00:58 14 subset, because very often during the trial you will just
02:01:02 15 jettison -- you know, even though it is allowed, you will say,
02:01:05 16 Oh, forget it, I am not going to put that in, and then we
02:01:08 17 won't release it to the jury.

02:01:09 18 So just as we do with paper, at the very end of the
02:01:13 19 trial, instead of crowding around a table and going through
02:01:16 20 the paper exhibits, you will be at the computer with
02:01:21 21 Ms. Brooks making sure that the ones that are being clicked
02:01:24 22 for release are the ones admitted into evidence.

02:01:27 23 MS. CARPENTER: So I guess we will then have to
02:01:29 24 provide a new disk anyway for Category 6 to be correct, and I
02:01:34 25 didn't include everything that you found to be inadmissible on

02:01:37 1 our disk.

02:01:38 2 So if it is okay, we will --

02:01:40 3 THE COURT: You can -- you don't have to, but if it
02:01:43 4 is something that you think maybe will open the door, you can
02:01:48 5 throw it on there if you like. I just wouldn't include, you
02:01:52 6 know, swaths of exhibits that have not been admitted, because
02:01:55 7 it is not likely they will be admitted. But if you can think
02:01:58 8 of a few categories where you think that maybe they will open
02:02:02 9 the door, I have no problem with you putting it on there. It
02:02:05 10 is no skin off our nose.

02:02:13 11 What I just don't want to do is if you double the
02:02:16 12 number of exhibits, for example, going through the list having
02:02:16 13 to do that, that would be a chore.

02:02:17 14 MR. RIORDAN: Just to clarify one thing, Your Honor?

02:02:19 15 When this issue came up, I believe they rationalized
02:02:23 16 putting them on on the basis of if they didn't do something it
02:02:27 17 might have been considered that they waived the opportunity.
02:02:30 18 I just want to make sure if we decide not to put them on, we
02:02:33 19 will not be subject to that.

02:02:34 20 THE COURT: No. I mean, it is technically not even
02:02:41 21 part of the record, the disk. So don't worry about that at
02:02:45 22 all.

02:02:45 23 We are testing it. There may be an issue, I think,
02:02:49 24 with some of the naming conventions, how it is uploading, but
02:02:53 25 I will let you know immediately. I have a 2:30 status. After

02:02:57 1 that I will sit down with Ms. Brooks and we will sit down and
02:03:01 2 figure out what uploaded appropriately and what did not.

02:03:04 3 So hold off actually before you update your chart,
02:03:08 4 because I may have to ask you to do something with some of the
02:03:12 5 file exhibit names.

02:03:16 6 MS. CARPENTER: And, Judge, we wanted to confirm the
02:03:19 7 pleading and interrogatory answers and discovery responses.
02:03:23 8 Those aren't on the disk, but we may want to use them for
02:03:26 9 impeachment or something like that.

02:03:28 10 So we didn't want to be foreclosed from doing so
02:03:32 11 simply because it is not an exhibit or not on that list.

02:03:35 12 Do you want to us put it on if we think we may use
02:03:38 13 it?

02:03:39 14 THE COURT: Yes, you might as well.

02:03:44 15 Actually, since you -- since we are going to need
02:03:58 16 deposition transcripts if you are going to impeach, you can
02:04:04 17 throw them on there instead. Just make it some exhibit number
02:04:15 18 way high and start a new series of deposition transcripts, and
02:04:20 19 other discovery.

02:04:23 20 MS. CARPENTER: And, Judge, you had ruled on the
02:04:26 21 demonstrative exhibits, whether we could use them for opening
02:04:29 22 or closing, but it is our understanding, and we want to be
02:04:33 23 sure it is correct, we can use the other exhibits that have
02:04:36 24 been determined to be admissible during trial during our
02:04:38 25 opening and closing?

02:04:40 1 THE COURT: Yes.

02:04:41 2 MS. CARPENTER: Okay.

02:04:41 3 Then we just had a couple questions about witnesses,
02:04:44 4 Judge.

02:04:45 5 The plaintiff has been kind enough to give us their
02:04:48 6 anticipated list in order, and their first witness, actually
02:04:53 7 their first three witnesses, are all our current employees,
02:04:58 8 Mr. Silverman, Ms. Miedema, and Mr. Fairhead, and it is our
02:05:04 9 understanding that we are supposed to put on our direct
02:05:07 10 examination of these witnesses immediately following the
02:05:11 11 plaintiff's cross-examination.

02:05:15 12 The plaintiff, herself, is at the end of the list of
02:05:19 13 witnesses for the plaintiff's case, and our concern is that if
02:05:25 14 we need to rebut any information that she brings out for the
02:05:28 15 first time that our witnesses didn't have a chance to discuss
02:05:32 16 originally, we would like an opportunity to bring them in to
02:05:36 17 rebut only that limited amount of information.

02:05:39 18 Will we have an opportunity to do that?

02:05:42 19 THE COURT: Yes. That is par for the course, because
02:05:44 20 I require the directs to be done in the plaintiff's case.
02:05:47 21 That is not a problem.

02:05:48 22 MR. RIORDAN: And just to clarify, Your Honor, we
02:05:50 23 can't quite anticipate the things they are going to emphasize,
02:05:54 24 put in or not put in.

02:05:56 25 Do we have an obligation in any way to anticipate

02:05:59 1 what she is going to say?

02:06:02 2 THE COURT: You do have -- it is an exaggeration to
02:06:06 3 say you have no way of knowing what she is going to testify
02:06:10 4 to.

02:06:11 5 MR. RIORDAN: I didn't mean in total respect, but
02:06:13 6 there have been changes as the case has progressed, positions
02:06:18 7 they take, let's put it that way, and to some extent it is
02:06:22 8 kind of unfair for us to have to anticipate what they are
02:06:25 9 going to emphasize or not emphasize in putting on our direct
02:06:29 10 defense.

02:06:29 11 THE COURT: Right. But you know what the accusations
02:06:35 12 are, and there may be, you know, at the fringes some
02:06:44 13 differences that might surprise you, and then you go ahead and
02:06:48 14 you can call them again for rebuttal, but --

02:06:53 15 Here is another thing: You will have heard their
02:06:57 16 cross-examination, okay, and so you will know what you need to
02:07:00 17 get out.

02:07:03 18 There has never been a problem in the 25 trials that
02:07:06 19 I have conducted in which I have had this requirement where
02:07:13 20 the defense thought, now we are really in a trick bag. It
02:07:18 21 just has never happened that we have had a problem with this,
02:07:24 22 and it is very rare, actually, that the defense has even asked
02:07:28 23 for rebuttal, because everything did come in as they expected
02:07:32 24 in the plaintiff's case and in the direct.

02:07:38 25 MR. RIORDAN: Well, the only other comment I have is

02:07:42 1 my experience, limited with this particular issue, most
02:07:46 2 instances it is the defense saying, can we do so, so we don't
02:07:49 3 have to bring them back, and in that case, the Court can
02:07:55 4 exercise its discretion.

02:07:56 5 Secondly, for the record, we would ask that the
02:07:59 6 plaintiff be put on first so that we know. We are putting on
02:08:05 7 our defense basically without knowing what the plaintiff is
02:08:07 8 going to say.

02:08:08 9 THE COURT: As I said, it is not going to be a
02:08:13 10 surprise to -- it is not going to be a surprise, I think, what
02:08:20 11 the plaintiff is going to say; and if there is a surprise, and
02:08:24 12 it doesn't even have to raise to the level of surprise, I am
02:08:27 13 not trying to say some difficult standard, and you need to
02:08:31 14 call your witnesses for rebuttal, then you can do that.

02:08:34 15 You will also have undergone cross-examination. So
02:08:37 16 it would be quite silly to not rebut something that was
02:08:45 17 brought up in cross-examination, right, in the direct. That
02:08:48 18 would be -- that would be bizarre.

02:08:52 19 You also know that she is going to claim that the
02:08:59 20 harassment reporting mechanism broke down, and you have her
02:09:04 21 version of why she thinks that broke down, and so you ought to
02:09:08 22 be covering that topic, too.

02:09:10 23 So that is how we will proceed.

02:09:15 24 MR. RIORDAN: All right.

02:09:16 25 MR. ADAMS: Judge, apropos of that, Judge, after the

02:09:20 1 -- so as part of this protocol, I obviously don't raise
02:09:25 2 conventional scope objections?

02:09:28 3 THE COURT: Right.

02:09:29 4 MR. ADAMS: If a new topic comes up on the -- on the
02:09:34 5 friendly examination of adverse witnesses that I have called,
02:09:40 6 I will get an opportunity to cross on those new topics?

02:09:45 7 THE COURT: Yes. That is recross.

02:09:48 8 MR. ADAMS: Right, okay.

02:09:51 9 THE COURT: So have you definitively decided not to
02:09:55 10 call certain witnesses? Or let me put it the other way. Who
02:09:59 11 are you calling? What is your order?

02:10:01 12 MR. ADAMS: Judge, I am doing this from memory, but
02:10:03 13 there aren't that many.

02:10:05 14 Mr. Silverman, Ms. Miedema, Gregory Fairhead,
02:10:15 15 Mr. Niemi, the plaintiff, the plaintiff's sister, Mr. Murphy,
02:10:30 16 and Mr. Trujillo.

02:10:42 17 Did I get it right?

02:10:43 18 MR. RIORDAN: I think so.

02:10:45 19 THE COURT: Okay.

02:11:00 20 And then from the defense, who are you anticipating
02:11:04 21 at least now calling who is not among those eight?

02:11:08 22 MS. CARPENTER: That would be Ms. Gracia, her mother.
02:11:12 23 She has the same name, different middle initial, Maria E.
02:11:17 24 Gracia, Mr. Tony Truppa, and Imran Haq, Judge.

02:11:29 25 THE COURT: You served a subpoena on Mr. Haq?

02:11:32 1 MS. CARPENTER: Yes.

02:11:33 2 MR. RIORDAN: Yes.

02:11:46 3 THE COURT: Anything else?

02:11:50 4 MS. KORN: The one other thing is you had asked the

02:11:52 5 defendant to identify deposition testimony about the

02:11:57 6 Sweetest Day card, and what they provided is about pastries.

02:12:02 7 It is not about the card.

02:12:06 8 I don't think there was anything in the deposition.

02:12:09 9 THE COURT: It doesn't appear to have been asked

02:12:12 10 about.

02:12:12 11 You can put the month and year.

02:12:14 12 MR. ADAMS: Thank you.

02:12:14 13 THE COURT: So let's gather 8:30 on Monday morning,

02:12:20 14 and that way we will be ready to go as soon as the jurors

02:12:25 15 trickle in.

02:12:27 16 Thank you.

02:12:30 17 MS. CARPENTER: Thank you, Judge.

02:12:31 18 MR. ADAMS: Thank you.

02:12:32 19 MS. KORN: Thank you, Judge.

02:12:33 20 MR. RIORDAN: And I will have a tie on that day. I

02:12:33 21 didn't expect to be here.

02:12:36 22 THE COURT: That is fine.

02:12:37 23 Thank you.

24 (Proceedings concluded.)

25

C E R T I F I C A T E

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

/s/Krista Burgeson, CSR, RMR, CRR January 2, 2015
Federal Official Court Reporter Date

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